SPECIFIC DENIALS IN AFFIRMATIVE DEFENSES.—The question whether a specific denial of a material allegation is ever in place in an affirmative plea was raised in the recent case of *Bulova* v. *Barnett* (App. Div., 1st Dept., 1920) 183 N. Y. Supp. 495.[1] The Appellate Division of the Supreme Court, in line with its previous decisions on the point,[2] took issue with the elaborate argument of the lower court,[3] *obiter,* that such a denial is *never* in place in an affirmative plea.

The higher court is, no doubt, correct in its statement that the commissioners originally appointed to codify the procedural laws of New York were in favor of abandoning all technical rules of pleading whenever adherence thereto would result in an injustice.[4] But, in view of the fact that strict pleading is generally desirable to crystallize the issues, it seems a neccessary corollary to this proposition that the common law pleading should be followed, where consonant with fairness.

Mr. Justice Bijur, in an extended opinion in the lower court, most clearly demonstrates the logical difficulties arising out of the inclusion of a denial in a plea of confession and avoidance. He correctly

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whether resort may or may not be had to the corpus to make that yearly payment and this resolves itself into a problem of construing a will. That this is the problem before the New York Court is very clear when they discuss the problem of trusts to pay income and trusts to pay annuities. This needless discussion was indulged in in Spencer *v.* Spencer, *supra.* In that case, though it was very clear that the yearly payments were to be uniform the trust was held to be one to pay income and not annuities; and this in spite of the fact that deficiencies in income during past years could be made up from the surplus of income during future years as it might accrue. That case was cited with approval by both courts in the principal case. So also was there a needless discussion of the same problem in Griffin *v.* Keese (1907) 187 N. Y. 454, 80 N. E. 367, when the only problem before the court was whether the whole residuary estate was to be held in trust or only an amount sufficient to pay annuities.

[1]The plaintiff sues as assignee of a corporation which admittedly had held a valid claim against the defendant. The defendant pleaded "payment before notice of any valid assignment to the plaintiff". Incidentally this plea was faulty as being a negative pregnant. The defendant sought to include in it denials of the material allegations of the plaintiff's complaint. These on motion, were properly stricken out as unnecessary. The higher court, although affirming this decision, pointed out that a special denial may be in place in an affirmative plea where such a denial is necessary to save the defense.

[2]Haffen *v.* Tribune Ass'n. (1908) 126 App. Div. 675, 111 N. Y. Supp. 225; Mendelson *v.* Margulies (1913) 157 App. Div. 666, 142 N. Y. Supp. 825; see Einstein *v.* Einstein (1913) 158 App. Div. 498, 143 N. Y. Supp. 706. In the Haffen case, the action was for libel and the defendant wished to include in a plea of privilege a denial of the extent of the plaintiff's alleged damage. The court, in affirming the order by which this denial was stricken out, said (p. 678): "Nor is the denial of the extent of the plaintiff's damage necessary, for if the article be true, justified or privileged, it is immaterial what damage the plaintiff suffered." It is submitted that all denials in an affirmative defense can be shown to be equally unnecessary if the affirmative plea is valid.

[3](1920) 111 Misc. 150, 181 N. Y. Supp. 247.

[4]First Report of the Commissioners on Practice & Pleading (N. Y. 1848) 71 *et seq.*

describes the common law plea in confession and avoidance,[5] as well as the so-called "new matter" in code pleading,[6] as a plea in which the defendant "gives color" to the plaintiff's complaint, that is, admits an apparent right in the plaintiff. The learned justice then proclaims, unanswerably as a matter of pure logic, the incompatibility with such a plea of any type of denial, since one cannot deny what one admits.[7]

As has been pointed out, the only excuse historically for permitting a denial in a plea of confession and avoidance can be that failure to do so would work an injustice to pleaders. And the Appellate Division contends that there are occasions where failure to deny specifically a material allegation of the complaint would render the affirmative plea unavailable. This, if true, would justify its conclusions. An examination of the cases, however, in which the Court has asserted that such an occasion existed, will, it is submitted, destroy the validity of the higher court's contention.

This is most clearly seen in *Dinkelspiel* v. *The New York Journal etc.*[8] The plaintiff sued for libel and alleged malice. The defendant set up privilege and included a denial of the malice. The court reversed an order to strike out the denial, since, it said, malice was material and a failure to deny it would admit it.[9] But the court failed to note that, although malice is said to be a material part of the plaintiff's cause of action in libel, it does not become material in the pleadings unless and *until* privilege is pleaded.[10] Hence, it was unnecessary for the defendant in this case to have denied the malice, since a failure to deny an immaterial allegation by no means admits it.[11]

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[5]Stephen, Principles of Pleading (Williston's ed. 1895) *233.

[6]Pomeroy, Code Remedies (4th ed. 1904) §§ 549, 563.

[7]It is to be noted that a specific denial of a material allegation, if successful, as effectually defeats the plaintiff's cause of action as does a general denial. Hence, there seems little basis for the distinction made by the higher court that a specific denial is permissible on occasion in a plea in confession and avoidance, but that a general denial is not. This distinction arose in the Haffen case, *supra,* footnote 2. In the previous case of Dinkelspiel *v.* The New York Evening Journal, *infra,* footnote 9, this court had allowed the inclusion of a general denial in an affirmative defense.

[8](1904) 91 App. Div. 96, 86 N. Y. Supp. 375.

[9]It is, of course, true, that all *material* allegations which are not denied are deemed to be admitted. N. Y. Code Civ. Proc. § 522.

[10]If the plaintiff proves that the defendant wrote or printed the libellous matter it is said that malice will be presumed as a matter of law. It seems more exact to say that malice is not material. The mere untruth of the words is usually sufficient. If, however, the defendant admits the libellous matter, but pleads that it was printed or written under such circumstances as to render it privileged, it remains for the plaintiff to show in his replication that the defendant was *actually* inspired by malice. Odgers, Libel and Slander (5th ed. 1911) c. 12.

[11]*Cf.* Sands *v.* St. John (N. Y. 1862) 36 Barb. 628, 634; Fry *v.* Bennett (N. Y. 1851) 7 Super. Ct. 54, 64. § 1907 of the N. Y. Code Civ. Proc. does not change the common law rule. See Stuart *v.* Press Pub. Co. (1903) 83 App. Div. 467, 475, 82 N. Y. Supp. 401. That this section does not render it impossible to raise the issue of privilege is most clearly evidenced by the Dinkelspiel case itself, in which the fairness of the defendant's report was in question.

In the case of *The Ivy Courts Realty Co.* v. *Morton*,[12] the plaintiff set up a contract and alleged breach thereof. The defendant set up another contract as the true one and after alleging performance of this latter contract, in so far as the plaintiff itself permitted, rested. This defense is clearly argumentative and was correctly held bad. But the court declared, *obiter*, that it was bad simply because it had failed to include a denial of the alleged contract and its breach. It well saw that an admission of that contract would prove fatal. The solution of the court, however, does not seem the best. Proper pleading, it seems, would have required merely a denial of the alleged contract and breach. The contract claimed by the defendant to be the true one should have found no place in the pleadings, but would properly be introduced in evidence under the denial.[13] This type of case most clearly demonstrates the impropriety of an affirmative plea, where the matter is such that the defendant should introduce it under a denial of a material allegation of the complaint.

It is necessary in this note to analyze merely these two typical decisions involving this point, for all of those cited might be classified with one or the other of those discussed.[14] In all of them the denial sought to be included was either of an immaterial allegation, and hence unnecessary, or one under which all of the so-called affirmative matter should have been proved at the trial.[15] Hence, the case which the Appellate Division supposes,—one in which it is necessary to include a specific denial in an affirmative plea in order to render it available,—never exists.

As to the argument of the Appellate Division that a change in the law of pleading, such as is here suggested, might be more appropriate at a time when an organized effort is being made to simplify the practice, it is difficult to perceive its cogency. All law is subject to change by judicial decision and there seems to be no reason why this subject should be an exception or why the suggested change should cause any more confusion among lawyers than would any other.

THE LIABILITY OF A MUNICIPALITY FOR TORTS.—In discussing the liability of a municipality for injuries resulting from the negligence of its agents in performing their duties, it has become the practically universal procedure of bench and bar to invoke these premises: "Where the injuries resulted from the exercise of a governmental function, the city is not liable to private action; but it is under a common law liability

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[12](1902) 73 App. Div. 335, 76 N. Y. Supp. 687.

[13]Quinn *v.* Pennsylvania R. R. (1906) 114 App. Div. 663, 99 N. Y. Supp. 980.

[14]Thus, similar to the case of Dinkelspiel *v.* The New York Evening Journal are the cases of Haffen *v.* Tribune Ass'n., *supra,* footnote 2; Mendelson *v.* Margulies, *supra,* footnote 2; Soeurbee, Inc. *v.* Jatison Const. Co. (1918) 181 App. Div. 662, 168 N. Y. Supp. 842 and McDonald *v.* Press Pub. Co. (1916) 174 App. Div. 463, 161 N. Y. Supp. 356. Similar to the case of The Ivy Courts Realty Co. *v.* Morton is that of the Empire Trust Co. *v.* Magee (1907) 117 App. Div. 34, 102 N. Y. Supp. 9. And in several of the cases the proposition for which they are cited is mere *dictum.* See Enstein *v.* Einstein, *supra,* footnote 2; Empire Trust Co. *v.* Magee, *supra.*

[15]This result was to have been expected. The allegation sought to be denied must be either material or not. If material, its denial is sufficient without an affirmative plea; if immaterial, its denial is unnecessary.